86-177

In The
Supreme Court of the United States
October Term, 1986

ANTHONY R. TANNER and WILLIAM M. CONOVER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether sworn evidence that jurors in a complex criminal case consumed drugs and quantities of alcohol throughout the proceeding, rendering them unable to review the facts, requires an evidentiary hearing to determine whether defendants were afforded a fair trial by a jury capable of deciding the case on the evidence.

II. Whether the reach of Section 371 should be extended to a conspiracy to defraud a private corporation which is neither an agency of the federal government nor its duly authorized representative, where the government has suffered no pecuniary loss.

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The caption of the case in this Court contains the names of all parties to the appeal to the United States Court of Appeal for the Eleventh Circuit.

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OPINION BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is reported at *United States v. Conover*, 772 F.2d 765 (11th Cir.1985). The Court of Appeals' order denying rehearing and rehearing *en banc* is not printed in an official reporter at this date. The final judgment of the trial court was not printed in an official reporter.

STATEMENT OF JURISDICTION

This petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit arises from a decision by said court rendered September 30, 1985. The appellate court subsequently denied petitioners' timely petitions for rehearing and rehearing *en banc* on June 26, 1986. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C.§ 1254 (1) (1982).

STATUTORY PROVISIONS INVOLVED

This petition involves the sixth amendment of the United States Constitution, the federal conspiracy statute, 18 U.S.C.§ 371 (1982), and Federal Rule of Evidence 606(b). The portions pertinent to the issues raised herein are set forth below:

U.S.Const.amend.VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

18 U.S.C.§ 371 (1982)—*Conspiracy to Commit Offense or To Defraud United States:*

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to affect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Fed.R.Evid.606—*Competency of Juror as Witness:*

"(b) Inquiry into validity of verdict or indictment.

"Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes."

STATEMENT OF THE CASE

Petitioners Anthony R. Tanner, a private contractor, and William M. Conover, the former manager of procurement of Seminole Electric Cooperative, were convicted of having conspired to "defraud the United States" by impeding the "function of the Rural Electrification Administration in its administration of its guaranteed loan program," and by depriving Seminole of "its right to the honest and faithful services of its employees."

After the verdict in the second trial (the first ended in a hung jury after six weeks), defense counsel received a telephone call from a juror stating that several jurors had consumed alcoholic beverages during luncheon recesses and had consequently fallen asleep during the afternoon

trial sessions. The trial judge tersely denied the request for an evidentiary hearing, stating, "I didn't see anyone sleeping" (Tr.XIX at 57)[1].

While the appeal was pending, counsel received an unsolicited visit at his home from another juror, who stated that he had been struggling with his conscience for months and felt the defendants should have an opportunity to be judged by jurors who "would review the facts right" (App. 47), rather than by people who felt as though they were "on one big party" (App. 26) and had "no business being on the jury" (App. 47). He confirmed in a sworn statement (App. 23) that many of the jurors were consuming large quantities of alcohol each day during the luncheon recess (a liter of wine by the foreperson, one or two mixed drinks each by two other female jurors, and a pitcher of beer each by the male jurors), and stated, in addition, that the four male jurors smoked marijuana daily during the lunch recess. Further, two of the jurors were "injesting" "a couple of lines" of cocaine at the City parking garage during the lunch breaks (App. 39-45), one of whom sold the other a quarter pound of marijuana during the trial (App. 51-52), and took marijuana, cocaine and drug paraphernalia into the United States District Courthouse and came out of the jurors' restroom "sniffing like he got a cold" (App. 38, 51). The juror concluded that the use of these intoxicants and narcotics caused the jurors to be "messed up," "stutter a . . . bit," and "falling asleep all the time during the trial"

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[1] As used herein, "Tr. —" refers to the trial transcript; "R. —" refers to the Record on Appeal below; and "App. —" refers to the Appendix to this Petition.

(App. 46), which prevented the jury from reviewing the facts in this complex case so as to afford the defendants a fair trial (App. 47).

Despite this sworn evidence of jury misconduct, the district judge again refused to hold an evidentiary hearing (R.1086-90) and the Eleventh Circuit affirmed, holding that the use of alcohol and narcotics by jurors did not constitute an "outside influence," under Fed.R.Evid.606(b) and, therefore, that "the district court was under no duty to investigate the allegations, and did not abuse its discretion in refusing to conduct an evidentiary "hearing" (App. 10).

The evidence showed that Seminole (a private Florida corporation owned by several rural electric cooperatives) borrowed funds from an agency of the United States Treasury in order to construct a coal-fired power plant and that the loan was guaranteed by the Rural Electrification Administration ("REA"). When the contractor for the patrol road beneath the power transmission lines was unable to construct these roads with the available sand fill material, Conover, the Procurement Manager, contacted his friend Tanner, who recommended the use of limerock overburden which he had available for sale. That material was inspected and approved by Seminole's engineering department. Because Seminole's internal policy required bids for contracts in excess of $200,000, specifications were drawn for fill material requiring limerock content in accord with the overburden recommended and supplied by Tanner, giving him an advantage over other bidders and violating Seminole's internal conflict of interest policies. The Eleventh Circuit rejected petitioners'

contention that the evidence did not establish a conspiracy or scheme to defraud the United States, as charged.

Specially concurring, Judge James C. Hill stated:

> "Section 371 criminalizes conspiracies 'to defraud the United States, or any agency thereof in any manner or for any purpose.' It does not criminalize a conspiracy to defraud a private party. The evidence in this case was sufficient to prove that the defendants conspired to defraud Seminole Electric. In my view, however, the prosecution did not prove a conspiracy to defraud the government of the United States" (App. 17).
>
> "No Supreme Court decision has upheld a conviction under section 371 . . . where the defendants neither defrauded the federal government of its funds or property nor interfered with United States government officials or their agents performing an official function of the federal government" (App. 17-18).
>
> "[I]n section 371 Congress obviously did not criminalize every conspiracy with the intent or effect of thwarting that objective. Congress has demonstrated well its ability to utilize the criminal law to protect its far-flung financial and other interest in non-federal programs and entities. Because it has not done so here, section 371 should not be construed to reach appellants' acts" (App. 21-22).

After having been pending before the Court of Appeals for more than nine months, the petition for rehearing and suggestion for rehearing *en banc* were denied. This petition followed.

ARGUMENT

Point I

The Eleventh Circuit's decision, which holds that sworn evidence that jurors in a complex criminal case were consuming drugs and quantities of alcohol which rendered them unable to review the facts, does not require an evidentiary hearing because Fed.R.Evid.606(b) is limited to " 'extraneous prejudicial information . . . or . . . outside influence' " (App. 10), is contrary to the decisions of this Court which hold that the sixth amendment guarantees a criminal defendant the right to a trial by a panel of jurors capable of deciding the case on the evidence.

The sixth amendment requires that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ." (U.S. Const. amend.VI). This Court has long recognized that the foundation of our system of criminal justice is the right to a trial before "a jury capable and willing to decide the case solely on the evidence before it . . . ." *Smith v. Phillips*, 455 U.S.209, 217 (1982). *Accord Parker v. Gladden*, 385 U.S.363, 364 (1966); *Turner v. Louisiana*, 379 U.S.466, 472 (1965); *Irvin v. Dowd*, 366 U.S.717, 722 (1961).

In *Smith v. Phillips*, this Court emphasized that where the impartiality of a juror is challenged, the defendant has a right to an evidentiary hearing to determine whether defendant was afforded a fair trial.

> "This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." 455 U.S. at 215 [citing *Remmer v. United States*, 347 U.S.227 (1954)].

In *Remmer v. United States*, 347 U.S.227, 229 (1954), this Court held that evidence of outside influence on a juror during the course of trial was "deemed presumptively prejudicial," thereby requiring an evidentiary hearing at which the government has the heavy burden of demonstrating "such contact with the juror was harmless to the defendant." Where there is sworn evidence that the jurors were not able to comprehend and review the facts because of their inebriated condition, a defendant should be entitled to the similar right to a *Remmer*-type hearing.

This and other courts have recognized the right to a mentally competent jury. *See, e.g., Jordan v. Massachusetts*, 225 U.S.167 (1912); *Sullivan v. Fogg*, 613 F.2d 465, 467 (2d Cir.1980) (trial before jury with an insane juror inconsistent with due process). However, the Eleventh Circuit opinion would limit the scope of the sixth amendment's protection to instances involving " 'extraneous prejudicial information' " or " 'outside influence'." Thus, under the Eleventh Circuit's rationale, if a party discovered after the verdict that a number of the jurors were incompetent or deaf, no evidentiary hearing would be required to determine whether such infirmity rendered them incapable of comprehending the evidence and rendering an impartial verdict because those impairments do not involve " 'extraneous prejudicial information' " or " 'outside influence'." Here, a sworn statement demonstrates that the jurors in this case, by their excessive use of intoxicants and narcotics, were "flying," "messed up," "falling asleep," and clearly unable to comprehend and review the facts in this complex criminal case (App. 45-46). To hold that such evidence does not require an evidentiary hearing, much less a new trial, ignores this Court's consistent commitment to the sixth amendment's guarantee to a fair hearing by a panel of impartial jurors "capable and willing to decide the case on the evidence" *Phillips, supra*, 455 U.S. at 217.

Moreover, the Eleventh Circuit's opinion, which holds that substance abuse (whether occurring in a restaurant or a parking garage or in the jury room itself), does not constitute any " 'outside influence' " under Rule 606(b), stands alone and is contrary to every treatise or case that has yet addressed that issue:

> "Rule 606(b) would not render a witness incompetent to testify to jury irregularities such as intoxication . . . regardless of whether the jury misconduct occurred within or without the jury room." 3 J.Weinstein and M.Berger, Weinstein's Evidence ¶606[04] at 606-29 through 606-32 (1985).[2]

We are unaware of any prior case involving juror misconduct of such an egregious nature (and the government has cited none). This Court denied certiorari in *McIlwain v. United States*, — U.S.—, 104 S.Ct.409 (1983), where the fact that the foreperson was drinking prior to deliberation was called to the trial court's attention. The

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[2] *See, e.g., United States v. Taliaferro*, 558 F.2d 724, 726 (4th Cir. 1977), *cert.denied*, 434 U.S.1016 (1978) (evidentiary hearing held to determine whether drinks consumed at dinner affected jurors in the performance of their duties); *Jorgensen v. York Ice Machine Corp.*, 160 F.2d 432, 435 (2d Cir.), *cert.denied*, 332 U.S. 764 (1947) (L. Hand, J.) (drunkenness and bribery are matters about which jurors may give testimony after the verdict); *Faith v. Neely*, 41 F.R.D.361, 366 (N.D.W.Va.1966) (affidavit claiming one juror was intoxicated caused court to present questionnaire to each juror to determine whether the "juror's faculties were affected and [whether] he could . . . discharge his duties"); *Gamble v. State*, 33 So.471, 473 (Fla.1902); 8 Wigmore *Evidence* § 2354 at 703 (McNaughton rev.1961).

judge immediately held a separate *voir dire* of each juror, ordered a three-day recess and, upon examination the following Monday, detected no further disability. *Lee v. United States*, 454 A.2d 770, 774 (D.C.App.1982). The District of Columbia Court of Appeals noted:

> "During this whole process, only one juror was involved, and only a short period of deliberations was called into question. There is no evidence that any drinking actually occurred in the jury room or during the course of the trial, and the jury foreperson was not conclusively shown to have been intoxicated at the time of *voir dire*. The recess, coupled with the judge's checking in on the jury on Monday, both of which were done with the concurrence of appellant's counsel, foreclosed the possibility of prejudice. Under these circumstances, it cannot reasonably be said that the appellants were substantially deprived of their right to the judgment of objective and competent jurors." 454 A.2d at 772.

By contrast, the sworn evidence presented here shows that at least seven of the jurors consumed large amounts of alcohol and/or drugs; that the drinking of alcoholic beverages and smoking of marijuana together occurred throughout the course of the proceedings; that cocaine was being used on a regular basis; and that drugs and paraphernalia were actually taken into and used in the jury room. And here, *no* evidentiary hearing was ever held.

The dissent of Mr. Justice Marshall from the denial of the petition in *McIlwain* applies with even greater force to the facts presented in the instant case:

> "This Court has repeatedly insisted in a wide variety of contexts that the right to be tried before a jury capable and willing to decide a case solely on the evidence before it is a cornerstone of our criminal justice system. See, e.g., *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). This precious right is denigrated when a conviction resting upon deliberations tainted by a juror's gross and debilitating impropriety is allowed to stand." — U.S. at —, 104 S.Ct. at 411.

> "[D]ue process may well require the granting of a mistrial whenever a trial judge finds that a juror, already engaged in deliberations, is so drunk that the deliberations must be recessed. This rule would undoubtedly affect very few trials; drunkenness on the part of active jurors is certainly an abberation. As to objections that this *per se* rule would create inconvenience and pose a drain on judicial resources, the only response is that such costs are what we must pay in order to give more than lip service to our claim that trial by an impartial and competent jury constitutes a 'priceless' right. *See Irvin v. Dowd, supra*, 366 U.S. at 721, 81 S.Ct. at 1641." — U.S. at —, 104 S.Ct. at 412-13.

Point II

The Eleventh Circuit's opinion extends the reach of Section 371 to a conspiracy to defraud a private corporation which is neither an agency of the federal government nor its duly authorized representative, where the government has suffered no pecuniary loss.

As stated by Judge Hill:

> "No Supreme Court decision has upheld a conviction under section 371 . . . where the defendants neither defrauded the federal government of its funds or property nor interfered with United States government officials or their agents performing an official function of the federal government." (App. 17-18, Hill, J., specially concurring.)

Yet the majority's opinion extends the reach of Section 371 to a conspiracy involving allegations that a private con-

tractor defrauded "a private party .... Seminole Electric .... [without any proof of] a conspiracy to defraud the government of the United States" (App. 17).

Seminole Electric is neither an agency of the federal government nor its representative performing a duly authorized federal governmental function. Granted, it received a loan from a federal agency, and its loan was guaranteed by the REA, but as noted:

> "Congress has deliberately avoided undertaking the construction of rural power plants as a federal government enterprise. I have little doubt that Congress has an interest in 'seeing that the entire project [receiving its aid] is administered honestly and efficiently and without corruption and waste' .... But in section 371 Congress obviously did not criminalize every conspiracy with the intent or effect of thwarting that objective" (App. 21).

Thus, the panel's opinion ignores the limitations previously imposed on the reach of Section 371 and would criminalize any dishonest act involving any program funded or guaranteed by the federal government. As stated by Judge Hill: "By artful lawyering, one might easily blur the distinction between the United States government and those receiving its support beyond clear recognition" (App. 20).

The Fifth Circuit squarely addressed this issue in *United States v. Porter*, 591 F.2d 1048 (5th Cir.1979)[3], where

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[3] The holding in *Porter* limiting application of Section 371 to instances involving loss of federal funds or property, or interference with federal officials or their authorized agents, is consistent with established case law. *See, e.g., United States v. Johnson*, 383 U.S.169 (1966); *United States v. Walter*, 263 U.S.15 (1923); *United States v. Brasco*, 516 F.2d 816 (2d Cir.), *cert. denied*, 423 U.S.860 (1975); *United States v. Del Toro*, 513 F.2d 656 (2d Cir.), *cert.denied*, 423 U.S.826 (1975).

physicians who obtained increased fees by submitting blood samples to "manual" rather than "automated" laboratories for testing were charged with conspiracy to defraud the United States of its "right to have the Medicare program conducted honestly, fairly and free from deceit" (591 F.2d at 1055). The Court reversed their convictions, holding that if the government proceeds under a theory of interference with a federal agency, it must specifically plead and prove the governmental function which has been obstructed:

> "Since it is conceded that the government has not been subjected to any property or pecuniary loss by the activity set forth in the indictment, the conspiracy count can stand only if the government can point to some lawful function which has been impaired, obstructed or defeated. The government simply asserts that it was defrauded of its right to have the Medicare program conducted honestly and fairly. In our opinion, in the context of a criminal prosecution, the government has failed to demonstrate interference with any of its lawful functions." 591 F.2d at 1055-56.
>
> "We must hold that the indictment failed to charge a conspiracy to defraud the United States and that the government failed to prove any such conspiracy at trial. It is our affirmative duty to carefully scrutinize indictments under the broad language of the conspiracy statute because of the possibility, inherent in a criminal conspiracy charge, that its wide net may ensnare the innocent as well as the guilty. We cannot hold that the defendants' conduct was 'plainly and unmistakably' proscribed by 18 U.S.C. § 371." *Id.* at 1057 (citations and footnote omitted).

The present indictment mirrors that found defective in *Porter:* It charges a conspiracy to interfere with the lawful functions of a governmental agency, but does not specify how the defendants' conduct caused such an obstruction or

interference; it does not allege any loss of government property or money; it does not allege that the contracts or the bidding procedure required REA approval; and it does not allege that any statute or regulation was violated by the alleged conspiracy. Neither did the proof at trial establish those elements.

One year later, another panel of the Fifth Circuit in *United States v. Burgin*, 621 F.2d 1352 (5th Cir.), *cert. denied*, 449 U.S.1015 (1980) (speaking through District Judge Garza, who wrote the majority opinion in the instant case), held the conspiracy statute *did* reach the actions of a state senator who used his position to exert undue influence upon officials of the state agency charged with administering a federally-funded Head Start training program. In his opinion for the majority in the instant case, Judge Garza does not even purport to limit the reach of Section 371 to cases involving "public officials" or "agents of the United States" (as he did in *Burgin*), but would encompass *all* projects with any nexis to the federal government. Thus, presumably, a home builder who defrauded a private individual whose mortgage was insured by the Federal Housing Authority would now be subject to the federal conspiracy statute, since Congress clearly would desire the project to be carried out "honestly and without corruption and waste." This Court has not approved such a broad extension of the consiracy laws, nor has Congress indicated an intent to make conduct against a private corporation without loss of federal funds a crime against the United States. Judge Hill in his specially concurring opinion recognized that "where a state or private party is simply acting as an agent of the United States government in the implementation of a truly federal program, a fraud upon the

agent may constitute a fraud upon the United States" (App. 19). However, he urged that

> "the courts should not generally find such an agency relationship in the absence of compelling evidence that the state or private party was in fact defrauded while acting as a mere agent of the federal government performing a constitutionally legitimate and duly authorized function of the federal government, rather than as a non-federal entity receiving some form of federal assistance" (App. 19).

In this case, clearly "Seminole Electric is neither an agency of the federal government nor its representative performing a duly authorized federal governmental function" (App. 21). Under such facts, the expansion of the federal conspiracy statute is wholly unwarranted and deprives these defendants of their due process right to a statute which "plainly and unmistakably" proscribes the conduct before they are punished for its violation. (*Porter, supra*, 591 F.2d at 1055.) As emphasized by Judge Hill:

> "Courts must always remain mindful, however, of the admonition that penal statutes are to be strictly construed, a rule that is 'perhaps not much less old than construction itself.' *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95, 5 L.Ed. 37 (1820) (Marshall, C.J.). . . . Thus it is essential that section 371 'plainly and unmistakably' proscribe the conduct of defendants before they are punished for its violation. [Citation omitted.] Courts may necessarily find it difficult to formulate and apply a definition of 'defraud,' as that term is used in section 371, that men and women 'of common intelligence' will easily understand. . . . 'The United States,' however, is a term that need not be so broadly and mysteriously defined" (App. 20-21).

CONCLUSION

For the above-stated reasons, petitioners respectfully request the Court to issue a writ of certiorari to the Court of Appeals for the Eleventh Circuit remanding the case for entry of a judgment of acquittal. Althernatively, the Court should require the district court to conduct a *Remmer*-type evidentiary hearing on juror misconduct.

Respectively submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-3431
84-3876

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIAM M. CONOVER and
ANTHONY R. TANNER,

Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Florida

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion ——, 11 Cir., 198-, —— F.2d ——).

(Filed June 26, 1986)

Before HILL and ANDERSON, Circuit Judges, and GARZA*, Senior Circuit Judge

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who

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* Honorable Reynaldo G. Garza, U. S. Circuit Judge for the Fifth Circuit, sitting by designation.

are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.
ENTERED FOR THE COURT:

James C. Hill
United States Circuit Judge

UNITED STATES of America,

Plaintiff-Appellee,

v.

William M. CONOVER and Anthony R. Tanner, Defendants-Appellants.

Nos. 84-3431, 84-3876.

United States Court of Appeals,
Eleventh Circuit.

Sept. 30, 1985.

Appeals from the United States District Court for the Middle District of Florida.

Before HILL and ANDERSON, Circuit Judges, and GARZA*, Senior Circuit Judge.

GARZA, Senior Circuit Judge:

A jury convicted William M. Conover and Anthony R. Tanner of conspiring to defraud the United States in violation of 18 U.S.C. § 371, and committing various acts of mail fraud in connection with the conspiracy in violation of 18 U.S.C. § 1341. Conover and Tanner have appealed, arguing that the district court abused its discretion in refusing to investigate allegations of juror misconduct; that the conspiracy count of the indictment failed to charge a crime against the United States; that the evidence is insufficient to support the mail fraud convictions; and that the district court made various evidentiary rulings which warrant reversal. We affirm the convictions.

I

Seminole Electric Cooperative, Inc. ("Seminole"), is a Florida corporation owned by several rural electric cooperatives located in central Florida. In 1979, Seminole borrowed over $1.1 billion from the Federal Financing

Bank, which is an agency of the United States Treasury, for the purpose of constructing a coal-fired power plant near Palatka, Florida. The loan was guaranteed by the Rural Electrification Administration ("REA"), which is an agency of the United States Department of Agriculture. The REA administers a guaranteed loan program for eligible rural electric cooperatives. Conover was employed as Seminole's manager of procurement.

Construction of the plant began in September 1979. In order to install a transmission line running from the plant to a substation located outside of Ocala, Florida, it was first necessary to build a fifty-one mile patrol road. The patrol road had to be made of materials which would support heavy trucks and resist flooding. The construction contract for the patrol road was originally awarded to Journagan Construction Company ("Journagan").

Journagan encountered problems soon after construction of the road began. It had been assumed that Journagan would be able to use sand located in the area where the road was being built. As it turned out, however, the sand would not compact to a density sufficient to support even lightweight vehicles. Seminole hired the engineering consulting firm of Ross and Associates ("Ross") to evaluate the situation. Ross suggested that the natural sands be used as the primary fill material, and then topped with a sand-clay mixture which would be more cohesive and stable. Journagan began to implement this method, but soon encountered difficulty in obtaining sufficient amounts of clay.

A meeting was held at Seminole's Tampa office in March 1981. The purpose of the meeting was to discuss ways of accelerating the construction project. The problem of obtaining adequate fill materials for the patrol road was

also discussed. During the meeting, Richard Sherrill, Seminole's supervisor of transmission engineering, instructed Conover to locate sources of fill material. Journagan representatives indicated that they had not attempted to locate alternative fill materials. They also indicated that the contract price would have to be increased substantially in order for them to complete the road. Journagan's contract was subsequently terminated.

Following the meeting, Conover called Tanner. Tanner owned a limerock mine, and was also involved in the real estate development business. Tanner and Conover discussed the possibility of using limerock and limerock overburden as an alternative fill material. Limerock overburden is a material which is generally found above limerock deposits. On March 26, 1981, at Conover's request, Seminole engineer Ken Bachor examined the fill material available at Tanner's Citra Mine. Bachor later advised Sherrill that the material would be adequate for the project. Sherrill subsequently issued a purchase order to acquire enough limerock overburden to keep construction underway. Conover did not investigate any other sources of alternative fill materials.

Tanner and Conover were friends, and had gone on several fishing trips together. They had flown to the Bahamas together in Tanner's private plane in 1980. In May 1981 Conover purchased a condominium from Crystal River Investors, a company owned by Tanner. Tanner loaned Conover $6000 so that Conover could close on the condominium; this money was repaid in June 1981. Previously, in January 1981, Conover had contracted with Tanner to perform landscaping work and install a sprinkler system at the condominum complex for a fee of approximately

$13,750. On March 9, 1981, Tanner gave Conover a check for $10,035 which was allegedly made in partial payment of the money owed under the landscaping contract. Conover received a total of $15,000 under the landscaping contract. The record does not reflect how much of the $15,000 was profit.

With Journagan no longer working on construction of the patrol road, it became necessary to award a new contract for the construction of the patrol road through Seminole's formal competitive bidding procedure. Seminole decided not to award just one contract for the patrol road project as it had done with Journagan. Instead, the company decided to bid out two separate contracts: one to provide fill material and one to provide for the spreading of the fill material. The specifications for the fill material described in the contract were drawn up by Seminole's procurement department. The specifications stated that the fill material had to have a limerock content of at least twenty percent. This requirement worked in favor of Tanner for several reasons. First, the Citra Mine was relatively undeveloped. That is, there was a great deal of overburden still present above the limerock deposits; consequently, it would be easy for Tanner to remove the overburden, then mix in only the minimum amount of limerock necessary to meet the specifications required by the contract. Second, the contract specifications excluded contractors who could have made bids had the contract required the use of a sand and clay mixture rather than a limerock mixture. Additionally, one contractor complained that the time period in which bids had to be submitted was too short. Tanner submitted the lowest of several bids made on the fill contract, and was awarded the job. Tanner also made the lowest bid on the spreading contract, and was awarded that job as well.

More problems arose after Tanner began working on the road. First there was a dispute as to which party, Seminole or Tanner, was required to maintain the access roads leading to the patrol road. Conover and another Seminole employee advised Kenneth Bachor, Seminole's manager of transmission engineering, that the contract was ambiguous, and that Seminole should pay; Seminole ended up paying the costs of maintaining the access roads. Subsequently, REA complained that the bond provided by Tanner was unacceptable because the bonding company was not on the Treasury Department's list of approved sureties. In a letter dated July 17, 1981, Conover told another bonding company that the patrol road had been "essentially" completed, and that the work had been performed in a satisfactory manner. In another letter dated July 6, 1981, Conover stated that fifty percent of the road had been completed. In fact, the road was less than half finished at that time. It was also learned that limerock weakens when it becomes wet; consequently, the limerock mixture could not be used in areas subject to water flooding. As a result, "clean sand" had to be substituted in high-water areas. Tanner charged $4.75 for each cubic yard of fill material delivered and spread; Journagan had been charging only $3.82 per cubic yard of pure sand delivered and spread. The patrol road was completed in October 1981.

Prior to the time the road was completed, in June 1981, representatives of the Withlacoochie Rural Electric Cooperative, Inc., which was a member of the Seminole

cooperative, demanded that Seminole terminate all business relations with Tanner. This demand was based on alleged improprieties in the manner in which the contracts with Tanner had been awarded. Federal authorities were investigating the situation by November 1981. Conover was subsequently suspended, then demoted, for violating Seminole's conflict of interest policies.

Tanner and Conover were first indicted in June 1983. The six week trial that followed resulted in a hung jury, and a mistrial was declared. Tanner and Conover were subsequently reindicted on a five count indictment. Count I alleged that Tanner and Conover had conspired to defraud the United States in violation of 18 U.S.C. § 371; counts II through V alleged separate instances of mail fraud in violation of 18 U.S.C. § 1341. Conover was convicted on all counts. Tanner was convicted on counts I, II, IV, and V. Two motions for new trial based on allegations of jury misconduct were filed; both were denied.

II

Appellants' first contention is that the district court erred in refusing to conduct an evidentiary hearing for the purpose of investigating claims of jury misconduct. The factual underpinnings supporting this contention are somewhat unusual. Allegations of jury misconduct were originally pressed by the appellants while their motion for new trial was still pending. In a sworn affidavit, Tanner's attorney stated that he received an unsolicited phone call from a juror. The juror told Tanner's attorney that several members of the jury had been drinking during the lunch recess, and that several jurors had fallen asleep dur-

ing the trial. The district court considered the affidavit, heard arguments on the matter, and denied the motion for new trial.

Subsequently, and while the appeal of the case was pending in this court, Tanner filed, and Conover joined in, a motion for new trial based on newly discovered evidence of jury misconduct. In another affidavit, Tanner's attorney stated that on October 13, 1984, he received an unsolicited visit (at his residence) from a second juror. This juror was formally interviewed, presumably at the request of Tanner's attorney, by two private investigators on October 15. The interview was transcribed; the transcript was sworn to by the juror, and attached to the motion for new trial.

During the interview, the juror made a number of alarming allegations concerning the conduct of the jurors. He said that "the jury was one big party," and that several jurors, himself included, drank beer and smoked marijuana during the noon recess. He also stated that two of the jurors had on occasion injested cocaine during the noon recess, and that he had learned that one of these two jurors had offered to sell the other a quarter-pound of marijuana. He also indicated that he had voluntarily come forward with this information to clear his conscience, and that he had not received or been promised any type of remuneration for his statement. The trial court denied the motion for new trial based on this newly discovered evidence without first conducting an evidentiary hearing.

The decision to investigate allegations of jury misconduct rests within the sound discretion of the district court. *See U.S v. Darby*, 744 F.2d 1508, 1540 (11th Cir.1984).

"[T]here is no *per se* rule requiring an inquiry in every instance." *Id.* (quoting *U.S. v. Barshov*, 733 F.2d 842, 851 (11th Cir.1984)). When an evidentiary hearing is conducted, the inquiry is limited to determining "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." *See* FED.R. EVID. 606(b). The affidavit supporting appellants' motion for new trial does not allege that prejudicial information was brought to the jury's attention. Similarly, it does not allege that any outside influence was brought to bear upon any juror. Even if the allegations of substance abuse were true, there is no "adequate showing of extrinsic influence to overcome the presumption of jury impartiality." *Barshov*, 733 F.2d at 851. Thus, the district court was under no duty to investigate the allegations, and did not abuse its discretion in refusing to conduct an evidentiary hearing.

III

Appellants next contend that the indictment failed to charge, and the evidence did not establish, a conspiracy to defraud the United States. It is argued that a conspiracy to defraud the United States must involve a knowing violation of a federal agency's rules, regulations, or procedures.[1] The law does not, however, require such a showing.

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1. In connection with this assertion, appellants argue that the district court erred in excluding a letter from an REA representative to Harry Wright, Seminole's general manager. The letter stated that Seminole was not required to obtain REA approval of two of the contracts which had been awarded to Tanner. The letter also states that the bidding procedures used for

(Continued on following page)

Count I of the indictment charged appellants with violating 18 U.S.C. § 371. Section 371 provides in relevant part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof *in any manner or for any purpose*, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 371 (emphasis added). The Supreme Court has construed section 371 as reaching "any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of government." *Dennis v. United States*, 384 U.S. 855, 861, 86 S.Ct. 1840, 1844, 16 L.Ed.2d 973 (1966). The Court has also explained what types of fraud are contemplated by the statute:

> To conspire to defraud the United States means primarily to cheat the government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane, or the overreaching of those charged with carrying out the governmental intention.

(Continued from previous page)

those contracts did not require REA approval. Had the government been required to show a knowing violation of an REA rule, regulation, or procedure, the letter would have clearly been admissible. In light of our rejection of that contention, however, we fail to see the error in its exclusion.

Hammerschmidt v. United States, 265 U.S. 182, 188, 44 S.Ct 511, 512, 68 L.Ed. 968 (1924).

The conspiracy count in this case charged appellants with conspiring to defraud the government by "impeding, impairing, obstructing and defeating the lawful functions of the Rural Electrification Administration in its administration and enforcement of its guaranteed loan program." Count I also alleged twenty-five overt acts committed in furtherance of the conspiracy. Listed among these overt acts were the questionable business transactions which gave rise to this case. The evidence is clearly sufficient to support the conclusion that these transactions occurred.

Appellants suggest that these transactions showed, at the most, violations of Seminole's conflict of interest policy, not the existence of a conspiracy to defraud the REA. We reject appellants' contention that the indictment failed to charge a crime under section 371. There is no requirement in the statute, or in the cases construing the statute, that the object of the conspiracy must be to cause a financial loss to an agency of the government. *United States v. Burgin*, 621 F.2d 1352, 1356 (5th Cir. 1980); *United States v. Anderson*, 579 F.2d 455, 458 (8th Cir.), *cert. denied*, 439 U.S. 980, 99 S.Ct. 567, 58 L.Ed.2d 651 (1978). Nor is there any requirement that the indictment charge a knowing violation of an agency's rules, regulations, or procedures. The statute is designed "to protect the integrity of the United States and its agencies, programs, and policies." *Burgin*, 621 F.2d at 1356. Moreover, "[t]he United States has a fundamental interest in the manner in which projects receiving its aid are conducted. This interest is not limited strictly to accounting for United States Government funds invested in the project, but extends to seeing that the entire

project is administered honestly and efficiently and without corruption and waste." *United States v. Hay*, 527 F.2d 990, 998 (10th Cir. 1975), *cert. denied*, 425 U.S. 935, 96 S.Ct. 1666, 48 L.Ed.2d 176 (1976) (citing *United States v. Thompson*, 366 F.2d 167 (6th Cir. 1966), *cert. denied*, 386 U.S. 945, 87 S.Ct. 980, 17 L.Ed.2d 875 (1967)). It is undisputed that the money used to construct the power plant was borrowed from the Federal Financing Bank, which is an agency of the United States Treasury; nor is it disputed that the loan was guaranteed by the REA, which is also an agency of the federal government. The evidence supports the conclusion that Tanner and Conover engaged in collusive and dishonest business practices. This constituted a fraud on the United States under section 371.

IV

Appellants next contend that the evidence is insufficient to support their convictions[2] on the mail fraud violations alleged in counts II through V. The mail fraud statute, 18 U.S.C. § 1341, prohibits the use of the mails for the purpose of executing any scheme or artifice to defraud. The indictment charged that appellants used the mails for the purposes of (1) defrauding "the United States by impeding, impairing, obstructing and defeating the lawful function of the [REA] in its administration and enforcement of its guaranteed loan program;" and (2) defrauding Seminole "of its right to have its process and procedures for the

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2. Conover was convicted on each of the mail fraud violations alleged in counts II through V. Tanner was convicted on the mail fraud violations alleged in counts II, IV, and V; he was acquitted on count III.

procurement of materials, equipment and services run honestly and free from deceit. . . ."

Appellants argue that the convictions on counts II through V can be upheld only if the evidence establishes that they used the mails in effectuating a scheme to defraud Seminole. This is so, appellants contend, because the indictment did not charge, and the evidence did not establish, a violation of 18 U.S.C. § 371. We have already rejected this proposition. Thus, we need not reach the question of whether the evidence establishes the use of the mails for the purpose of effectuating a scheme to defraud Seminole. The convictions can be affirmed if the evidence establishes the use of the mails in effectuating a scheme to defraud the United States by "impeding, impairing, obstructing and defeating the lawful function of the [REA] in its administration and enforcement of its guaranteed loan program" as charged in counts II through V. In other words, the mail fraud convictions should be affirmed if the evidence establishes the use of the mails in connection with the section 371 violation alleged in count I.

Appellants do not contend that the mailings referred to in counts II through V did not occur. Nor is it argued that these mailings were not made in connection with the transactions which support their convictions on count I of the indictment. In order for the mail fraud convictions to stand, it must be shown that the use of the mail played an "integral" role in the scheme. *See United States v. Bosby*, 675 F.2d 1174, 1183 (11th Cir. 1982) (*citing United States v. Bethea*, 672 F.2d 407, 410, (5th Cir. 1982)). The government contends that the mailings played an integral role in the scheme by tending to create an "aura of legitamacy,"

see Bosby, 675 F.2d at 1183, around the transactions. We agree. Consequently, we affirm Conover's convictions on counts II through V, and Tanner's convictions on counts II, IV, and V.

V

Lastly, appellants argue that the district court made a number of erroneous evidentiary rulings. First, appellants point to seventeen instances in which the district court excluded evidence tending to prove that the materials supplied by Tanner were adequate and reasonably priced. We fail to see the relevancy of this evidence. The government's case was based on allegations of commercial bribery and bid-rigging; whether Seminole received a good bargain as a result of this conduct simply has no bearing on whether these activities actually occurred. The district court did not err in excluding this evidence.

Appellants next contend that the district court improperly limited their cross-examination of government witness Albert Guthrie. During the cross-examination of Guthrie, the defense brought out that Guthrie was being investigated for criminal tax fraud, that was testifying under a grant of use immunity and that he was testifying pursuant to a court order. Guthrie also stated that in his opinion, he would not be prosecuted for tax fraud because he agreed to testify. Guthrie denied that he was under investigation for anything else, and denied that he had told anyone that he was under investigation for anything else. Appellants argue that the district court abused its discretion in not permitting defense counsel to continue to interrogate Guthrie concerning other investigations. We disagree. Guthrie had already denied having knowledge

of any other investigation. Moreover, the district court had already permitted a wide range of cross-examination concerning Guthrie's promise of use immunity. The district court's ruling did not constitute an abuse of discretion.

Appellants' last contentions concerns the testimony of Donald Gilbert, a private investigator who had been hired to investigate the relation between Tanner and Conover. The district court permitted Gilbert to testify that after making his investigation, he concluded that there was "collusion" between Conover and Tanner. In light of the context in which this statement was made, the length of the trial, and the other evidence supporting the conclusion that there was collusion between Tanner and Conover, we conclude that the error, if any, in the admission of this testimony was harmless. *See* FED.R.CRIM.P. 52(a).

VI

For the reasons set forth above, the convictions are affirmed.

AFFIRMED.

JAMES C. HILL, Circuit Judge, specially concurring:

Although I do not believe 18 U.S.C. § 371 should be construed to penalize the conspiracy proved in this case, I concur in the judgment of the court because this panel is bound by the decision of the Fifth Circuit in *United States v. Burgin*, 621 F.2d 1352 (5th Cir.), *cert. denied*, 449 U.S. 1015, 101 S.Ct. 574, 66 L.Ed.2d 474 (1980), which is inconsistent with the views I express below.

Section 371 criminalizes conspiracies "to defraud the United States, or any agency thereof in any manner or for any purpose." It does not criminalize a conspiracy to defraud a private party. The evidence in this case was sufficient to prove that the defendants conspired to defraud Seminole Electric. In my view, however, the prosecution did not prove a conspiracy to defraud the government of the United States.

It has long been the case that the prosecution need not show any monetary or property loss to the federal government to sustain a conviction for conspiracy to defraud the United States under section 371. *Haas v. Henkel*, 216 U.S. 462, 479, 30 S.Ct. 249, 253, 54 L.Ed. 569 (1910). In *Hammerschmidt v. United States*, 265 U.S. 182, 44 S.Ct. 511, 68 L.Ed. 968 (1924), the Supreme Court announced that to prove a violation of section 371, "[i]t is not necessary that the government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane, or the overreaching of those charged with carrying out the governmental intention." 265 U.S. at 188, 44 S.Ct. at 512. More recently, the Court reiterated that the statutory language reaches "any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of government." *Dennis v. United States*, 384 U.S. 855, 861, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1966) (quoting *Haas v. Henkel*, 216 U.S. at 479, 30 S.Ct. at 254). No Supreme Court decision has upheld a conviction under section 371, however, where the defendants neither defrauded the federal government of its funds or property nor interfered with United States

government officials or their agents performing an official function of the federal government.

As the court's opinion in this case notes, Seminole Electric was the recipient of a loan made by one federal government agency and guaranteed by another. Moreover, as would be expected in any such lending arrangement, the federal government was entitled to exercise a significant degree of control over the means by which the funds it was providing would be utilized. Intellectual honesty compels me to find those facts sufficient to bring the fraud committed in this case within the ambit of section 371, as that statute was construed by the Fifth Circuit in *Burgin v. United States*, 621 F.2d 1352. In *Burgin* the government proved that the defendants, who included a state senator, conspired to use the senator's position in state government to exert undue influence upon officials of the state agency responsible for administering a Head Start training program in that state. The court quite aptly described the scheme designed and executed by the defendants as "influence peddling of the rankest kind." The federal government provided 75% of the funding for the state contracts that were improperly sought and retained by the defendants in that case, and the United States Department of Health, Education and Welfare apparently was entitled to approve the proposals that were later reduced to contracts between the state and the company the conspirators were seeking to benefit. Although the defendants did not conspire to exert any influence whatsoever, undue or otherwise, upon the federal government, and no pecuniary loss to the government was shown, the court nonetheless upheld their conviction under section 371 for conspiracy to defraud the United States.

According to the court's opinion in *Burgin*, "[t]he indictment in this case charged overreaching of an agent of the United States by a public official having a financial quid pro quo interest in a federally financed contract." 621 F.2d at 1357. Of course, where a state or private party is simply acting as an agent of the United States government in the implementation of a truly federal program, a fraud upon the agent may constitute a fraud upon the United States. But in my view, the courts should not generally find such an agency relationship in the absence of compelling evidence that the state or private party was in fact defrauded while acting as a mere agent of the federal government performing a constitutionally legitimate and duly authorized function of the federal government, rather than as a non-federal entity receiving some form of federal assistance. Complete ownership or control of a nominally private entity by the federal government might serve as evidence of such a relationship. *See United States v. Walter*, 263 U.S. 15, 18, 44 S.Ct. 10, 11, 68 L.Ed. 137 (1923) (holding statute reached conspiracy to defraud the United States Emergency Fleet Corp., of which the United States owned 100% of the stock, where "the contemplated fraud upon the corporation if successful would have resulted directly in a pecuniary loss to the United States, and even more immediately would have impaired the efficiency of its very important instrument"). Extensive federal regulation of the state or private entity's activities on behalf of the federal government would also tend to support a conviction under section 371 for committing a fraud most directly upon a private party, but indirectly upon the federal government as well. *See United States v. Gold*, 743 F.2d 800 (11th Cir.1984), *cert. denied*,

— U.S. —, 105 S.Ct. 1196, 84 L.Ed.2d 341 (1985), (upholding conviction for defrauding the United States in violation of section 371 by conspiring to file false Medicare claims with private intermediary that received, adjudicated and paid such claims under contract with federal government agency). Federal government assistance, however, accompanied by only a modicum of federal supervision of the non-federal entity's activities, seems patently insufficient to render a fraud upon that entity a fraud upon the United States.

By artful lawyering, one might easily blur the distinction between the United States government and those receiving its support beyond clear recognition. Courts must always remain mindful, however, of the admonition that penal statutes are to be strictly construed, a rule that is "perhaps not much less old than construction itself." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95, 5 L.Ed. 37 (1820) (Marshall, C.J.). That well-known rule of construction is but a corollary to the comparably venerable "void for vagueness" doctrine of constitutional law. "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926). *See generally* Goldstein, *Conspiracy to Defraud the United States*, 68 Yale L.J. 405, 441-48 (1959). Thus it is essential that section 371 "plainly and unmistakably" proscribe the conduct of defendants before they are punished for its violation. *See United States v. Gradwell*, 243 U.S. 476, 485, 37 S.Ct. 407, 410, 61 L.Ed. 857

(1917); *United States v. Porter*, 591 F.2d 1048, 1055 (5th Cir.1979). Courts may necessarily find it difficult to formulate and apply a definition of "defraud," as that term is used in section 371, that men and women "of common intelligence" will easily understand. *See* Goldstein, *supra*, at 443. "The United States," however, is a term that need not be so broadly and mysteriously defined.

Appellants have defrauded Seminole Electric. Seminole Electric is neither an agency of the federal government nor its representative performing a duly authorized federal governmental function. Rather, under the Rural Electrification Act Congress has deliberately avoided undertaking the construction of rural power plants as a federal government enterprise. I have little doubt that Congress has an interest in "seeing that the entire project [receiving its aid] is administered honestly and efficiently and without corruption and waste." *United States v. Hay*, 527 F.2d 990, 998 (10th Cir.1975), *cert. denied*, 425 U.S. 935, 96 S.Ct. 1666, 48 L.Ed.2d 176 (1976). But in section 371 Congress obviously did not criminalize every conspiracy with the intent or effect of thwarting that objective. Congress has demonstrated well its ability to utilize the criminal law to protect its far-flung financial and other interests in non-federal programs or entities.[1]

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1. Chapter 47 of Title 18 of the United States Code, concerning fraud and false statements, provides a wide variety of examples. A general provision penalizes the knowing and willful making or use of false, fictitious or otherwise fraudulent statements "in any matter within the jurisdiction of any department or agency of the United States." 18 U.S.C. § 1001 (1982). Other federal statutes are more specific. It is a federal

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Because it has not done so here, section 371 should not be construed to reach appellants' acts.

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crime for any person to make "any false entry in any book, report, or statement of [any Federal Reserve bank, member bank, national bank or Federal Deposit Insurance Corporation (F.D.I.C.) insured bank] with intent to injure or defraud such bank, or any other company, body politic or corporate, or any individual person." 18 U.S.C. § 1005 (1982). Another section criminalizes the making or passing of statements known to be false "for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Department of Housing and Urban Development for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage insured by such Department." 18 U.S.C. § 1010 (1982). Federal law prescribes criminal penalties for knowingly making false statements for the purpose of influencing various actions of F.D.I.C. or Federal Savings and Loan Insurance Corporation insured institutions, 18 U.S.C. § 1014 (1982), and for knowingly making false statements "with respect to the character, quality, quantity, or cost of any work performed or to be performed, or materials furnished or to be furnished, in connection with the construction of any highway or related project approved by the Secretary of Transportation." 18 U.S.C. § 1020 (1982).

SWORN STATEMENT

DANIEL MARTIN HARDY

PERSON INTERVIEWED: Daniel Martin Hardy.

DATE OF INTERVIEW: October 15, 1984.

PLACE OF INTERVIEW: Holiday Inn, Interstate 4, Plant City, Florida.

PERSONS PRESENT: Daniel Martin Hardy, O. Douglas Beard, Investigative Research, Inc., and Walter E. Taylor, Investigative Research, Inc.

INTERVIEWED BY: O. Douglas Beard, Investigative Research, Inc.

Mr. Beard: Mr. Hardy, I have explained to you that I am a private investigator. I've also explained to you that Mr. Taylor is a private investigator. I believe that you know my face from having seen me during the trial of Anthony Tanner that took place in Tampa, Florida, during February and March, 1984. Do you recognize my face, do you know who I am?

Mr. Hardy: Yes.

Mr. Beard: I'm sorry?

Mr. Hardy: Yes.

Mr. Beard: All right, Mr. Hardy, thank you, I appreciate your picking up your voice as much as you can so it can be clearly understood. Mr. Hardy, I've explained to you today that I am here at the request of Attorney David Best, who was Mr. Tanner's defense council. Do you understand that?

Mr. Hardy: Yes.

Mr. Beard: I have also explained to you that our conversation is being tape recorded at this moment. Do you understand that?

Mr. Hardy: Yes.

Mr. Beard: Do I have your permission to record our conversation?

Mr. Hardy: Yes.

Mr. Beard: All right. Mr. Hardy, I am a Notary Public in the State of Florida. Do you know what a Notary Public is?

Mr. Hardy: Yes.

Mr. Beard: Essentially, a Notary Public is empowered to swear individuals to their statements. Do you understand that?

Mr. Hardy: Yes.

Mr. Beard: Would you raise your right hand for me please, Mr. Hardy, Knowing that I am a Notary Public, do you swear to tell the truth and nothing but the truth?

Mr. Hardy: Yes.

Mr. Beard: All right. Mr. Hardy, I'd like to talk to you first about your most recent meeting with David Best in Crystal River, Florida. Do you recall such a meeting?

Mr. Hardy: Yes.

Mr. Beard: How did the meeting come about?

Mr. Hardy: I seen Mr. Best on the side of the road.

Mr. Beard: All right, can you be a little bit more specific? Did you just happen to be in Crystal River?

Mr. Hardy: Right.

Mr. Beard: All right. Were you there alone?

Mr. Hardy: No.

Mr. Beard: Who was with you?

Mr. Hardy: My wife and son.

Mr. Beard: Did you go to Crystal River to see David Best?

Mr. Hardy: No.

Mr. Beard: Do I understand you correctly that your seeing David Best initially was pure circumstance?

Mr. Hardy: Right.

Mr. Beard: You did not have an appointment?

Mr. Hardy: No.

Mr. Beard: Once you saw Mr. Best in Crystal River, did you make any attempts to personally speak with him?

Mr. Hardy: Yes.

Mr. Beard: When did the meeting occur?

Mr. Hardy: Saturday.

Mr. Beard: Are we talking about this past Saturday?

Mr. Hardy: Right.

Mr. Beard: So, it would have been two days ago, it would have been October the 13th, is that correct?

Mr. Hardy: Right.

Mr. Beard: Where did you talk with Mr. Best?

Mr. Hardy: In one of his homes.

Mr. Beard: Was this in Crystal River?

Mr. Hardy: Right.

Mr. Beard: What did you tell Mr. Best?

Mr. Hardy: I told Mr. Best that I had some things on my mind that had been bothering me a long time and I wanted to clear my conscience.

Mr. Beard: All right. What was David Best's reaction?

Mr. Hardy: He asked me if I wanted to come in the house.

Mr. Beard: Did you go in?

Mr. Hardy: Yes. Reluctantly, but I did.

Mr. Beard: Did you go in voluntarily?

Mr. Hardy: Right.

Mr. Beard: All right. What did you tell Mr. Best?

Mr. Hardy: I told Mr. Best that I felt like that the trial, the jury didn't, I told him a lot of things, but the main thing I . . .

Mr. Beard: Well, let's just, let's start kind of one thing at a time, if we can. Did you discuss with Mr. Best any specific thing relative to jury conduct that concerned you?

Mr. Hardy: Right. Yes.

Mr. Beard: What did you talk about, with regard to jury conduct?

Mr. Hardy: I told him that I felt like that the jury was on one big party.

Mr. Beard: All right. Mr. Hardy, let's back up just a moment. Were you a juror in the Anthony Tanner trial that took place in February and March, 1984?

Mr. Hardy: Yes.

Mr. Beard: Were you one of the jurors who ultimately rendered a verdict?

Mr. Hardy: Yes.

Mr. Beard: All right. Now, you told Mr. Best that you felt the jury was on one big party, is that correct?

Mr. Hardy: Right.

Mr. Beard: Why did you feel that way?

Mr. Hardy: Because the actions that were being conducted by the jurors.

Mr. Beard: All right. Specifically, with regard to the jurors, what do you mean?

Mr. Hardy: Well, we all just, we used to go out to lunch and drink alcohol.

Mr. Beard: All right, now you're talking about the regular noon recess during the trial?

Mr. Hardy: Right.

Mr. Beard: When you say we, let's be more specific. Who do you recall drinking alcohol during lunch?

Mr. Hardy: Three, the three other male jurors and three of the women.

Mr. Beard: All right, Mr. Hardy, is it your recollection that there were four male jurors, including yourself?

Mr. Hardy: Right.

Mr. Beard: Would you please describe for me, the other three male jurors, either by name or physical description.

Mr. Hardy: One of them was a transmission mechanic in St. Petersburg, I believe his name was John.

Mr. Beard: What did he look like?

Mr. Hardy: He was a relatively younger individual, as myself.

Mr. Beard: Did he have blond hair?

Mr. Hardy: Long, straight blond hair.

Mr. Beard: All right, go ahead.

Mr. Hardy: And the other one was Craig, which worked for GTE, he lived in Largo, and another guy, which owned a carpet cleaning business out of Bradenton, Florida.

Mr. Beard: Do you recall his name?

Mr. Hardy: No, I don't.

Mr. Beard: Do you recall what he physically looked like?

Mr. Hardy: Yes, I do.

Mr. Beard: Would you please describe him?

Mr. Hardy: He was about five foot seven, had black, about a hundred and eighty, sixty, seventy pounds, had black, grayish, curly hair.

Mr. Beard: All right. Now, I want to make sure I understand you correctly. Are you telling me that you,

John, Craig, and the carpet cleaner all consumed alcohol during the noon recess while the trial was going on?

Mr. Hardy: Yes.

Mr. Beard: All right. Now, how much alcohol are we talking about, Mr. Hardy?

Mr. Hardy: Anywhere from a pitcher to three pitchers, depending upon how we felt.

Mr. Beard: Three pitchers of what?

Mr. Hardy: Budweiser.

Mr. Beard: Did you all drink Budweiser?

Mr. Hardy: Yes.

Mr. Beard: Did you participate equally with regard to your drinking? Did all four of you drink the beer?

Mr. Hardy: Yeah, but we didn't participate equally, I think we didn't consume the same amount, some consumed more.

Mr. Beard: Who were the heavier drinkers in the group?

Mr. Hardy: The guy that owned the carpet cleaning store, and John, the guy that was a transmission mechanic that lived in St. Petersburg.

Mr. Beard: All right, it was your impression that the carpet cleaner and John from St. Petersburg consumed more than you and Craig?

Mr. Hardy: Right.

Mr. Beard: All right. Now, you mentioned earlier that there were three female jurors who also drank. Would you please describe for me who those three women were?

Mr. Hardy: Well, two of them I would have to see their face again to (UNINTELLIGBLE), it's been a long time. But one specifically, because I felt like to me as much as she consumed all the time, she had to be an alcoholic.

Mr. Beard: All right. Would you describe for me this lady who you would consider to be an alcoholic?

Mr. Hardy: About five foot two and two hundred pounds.

Mr. Beard: Did she, was she on the jury from the beginning?

Mr. Hardy: Yes.

Mr. Beard: Was she an alternate?

Mr. Hardy: Yes.

Mr. Beard: Did she ultimately get on the jury?

Mr. Hardy: Yes.

Mr. Beard: When did this happen?

Mr. Hardy: When Craig asked to be dismissed for vacation purposes.

Mr. Beard: All right. Who was the foreman of the jury?

Mr. Hardy: She was.

Mr. Beard: All right. When you say she, you mean the lady that you've just described who consumed a lot of alcohol?

Mr. Hardy: Yes.

Mr. Beard: All right. Now, Mr. Hardy, when we're talking about, or when you are talking about a quantity of alcohol, how much do you mean?

Mr. Hardy: A liter.

Mr. Beard: A liter of what?

Mr. Hardy: Wine.

Mr. Beard: How often did you go to lunch with the lady who ultimately ended up as the foreman of the jury?

Mr. Hardy: Three times.

Mr. Beard: Did you see her drink on each of those occasions?

Mr. Hardy: Yes, I did.

Mr. Beard: Did she drink the same amount on each occasion?

Mr. Hardy: Yes, she did. One time we seen them, we wasn't with them, we was in the same place, but we were at different tables, on about five or six other occasions.

Mr. Beard: All right. On each occasion that you accompanied this lady and on each occasion that you observed her, was she drinking wine?

Mr. Hardy: Yes.

Mr. Beard: Did she order the same quantity?

Mr. Hardy: Yes.

Mr. Beard: Was it a liter?

Mr. Hardy: Yes.

Mr. Beard: Did you observe her drink the liter?

Mr. Hardy: Yes. Mostly the two other women were given a mixed drink, maybe one or two a piece.

Mr. Beard: All right.

Mr. Hardy: I never seen more than two though.

Mr. Beard: Okay. Dan, have you had any contact with Anthony Tanner since the trial?

Mr. Hardy: No. I never had no contact with Anthony Tanner.

Mr. Beard: Have you had any contact with David Best, other than this Saturday meeting that you initiated?

Mr. Hardy: No.

Mr. Beard: Has anyone encouraged you to meet with Mr. Best?

Mr. Hardy: No.

Mr. Beard: All right. Mr. Hardy, I want to talk to you now about something we just discussed previously with regard to John, the young transmission mechanic who was a member of the jury. During the course of the trial, did you become aware that John was smoking marijuana?

Mr. Hardy: Yes, I did.

Mr. Beard: How did you become aware of that?

Mr. Hardy: When we went to lunch or after the trial we would sit around and talk and he would ask us did we want to smoke, burn one with him, smoke one with him.

Mr. Beard: All right. Now, let me stop for just a minute. When you say we, who are you talking about?

Mr. Hardy: All of the four male jurors.

Mr. Beard: Okay, and now we're talking specifically about John, do I understand you correctly that John offered you marijuana?

Mr. Hardy: Yes.

Mr. Beard: Did he offer Craig and the carpet cleaner marijuana?

Mr. Hardy: Yes, he did.

Mr. Beard: Did any of you either singly or together during the trial, smoke marijuana?

Mr. Hardy: They did. I did on one occasion.

Mr. Beard: All right. Now, when you say they, Mr. Hardy, are you talking about . . .

Mr. Hardy: The four male, the three other male jurors.

Mr. Beard: All right. Did you see the marijuana being smoked?

Mr. Hardy: Yes. I did.

Mr. Beard: Where did this happen? And let's talk about each separate instance separately, when is the first time during the trial that marijuana was made available to you by John?

Mr. Hardy: About the second week.

Mr. Beard: And how did it occur?

Mr. Hardy: We was at lunch talking, and just one thing led to another.

Mr. Beard: What did John say?

Mr. Hardy: He asked us did we party very much.

Mr. Beard: And what happened as a result of that?

Mr. Hardy: Everybody said yeah. And he asked us did we want to go burn one with him.

Mr. Beard: This was the second week of the trial?

Mr. Hardy: Right.

Mr. Beard: Do you recall where you were when this conversation took place?

Mr. Hardy: Yes.

Mr. Beard: Where?

Mr. Hardy: Franklin Mall, Franklin Street mall.

Mr. Beard: Specifically, what store?

Mr. Hardy: Well, I don't know what store, but we was standing out beside some sandwich shop, Fish and Chips, whatever, I can't specifically think of the name, but I know the place was we went there and went and got us, we went through and got Arthur Treacher's, I think that's what it is, Fish and Chips.

Mr. Beard: So, it was at that location that John first mentioned the availability of marijuana?

Mr. Hardy: Right.

Mr. Beard: Did he have marijuana with him that day to offer?

Mr. Hardy: Yes.

Mr. Beard: Where did you go to smoke it?

Mr. Hardy: To the parking garage.

Mr. Beard: What parking garage are you talking about?

Mr. Hardy: The City of Tampa.

Mr. Beard: Where is that located?

Mr. Hardy: Twigg Street.

Mr. Beard: What street?

Mr. Hardy: Twigg.

Mr. Beard: Twigg Street? Mr. Hardy, how did you happen to select that parking garage?

Mr. Hardy: We had to park there.

Mr. Beard: All right. This is where your cars were parked?

Mr. Hardy: Right.

Mr. Beard: Did John have to go to his car to get the marijuana?

Mr. Hardy: At first.

Mr. Beard: All right. Did you all four participate on that day?

Mr. Hardy: No.

Mr. Beard: All right. That was the first time, right?

Mr. Hardy: Right.

Mr. Beard: Who did participate?

Mr. Hardy: John and the guy from Bradenton.

Mr. Beard: All right, John and the guy from Bradenton? Can you be more specific about the guy from Bradenton? Who is that?

Mr. Hardy: He owned the carpet cleaning store, the carpet cleaning business.

Mr. Beard: All right. Did John give the juror from Bradenton and Craig the marijuana?

Mr. Hardy: Craig didn't smoke none the first time.

Mr. Beard: All right, it was just John and the man from Bradenton?

Mr. Hardy: Right.

Mr. Beard: Was the marijuana free or did you have to pay for it?

Mr. Hardy: It was free.

Mr. Beard: All right. How much marijuana was consumed on that first occasion?

Mr. Hardy: One cigarette.

Mr. Beard: And what happened after that was finished?

Mr. Hardy: We went back to the courthouse.

Mr. Beard: All right. Was that marijuana consumed after the four of you had been drinking beer?

Mr. Hardy: Yes, it was.

Mr. Beard: Okay. Mr. Hardy . . .

Mr. Hardy: No, it wasn't, I'm sorry, we didn't drink none that day. I'm sorry, we didn't, we didn't drink none that day. We didn't have time.

Mr. Beard: Okay. All right. When is the second time that you can recall marijuana being offered?

Mr. Hardy: The next day.

Mr. Beard: Who offered marijuana?

Mr. Hardy: John.

Mr. Beard: How did it, how did the subject come up?

Mr. Hardy: He asked us did we want to go to smoke one with him again while we were at the Hyatt Regency Hotel.

Mr. Beard: Was this during lunch?

Mr. Hardy: Right.

Mr. Beard: Had you consumed any alcohol at the Hyatt Regency?

Mr. Hardy: Yes, we had.

Mr. Beard: How much?

Mr. Hardy: One pitcher.

Mr. Beard: One pitcher between the four of you?

Mr. Hardy: Four of us, yes.

Mr. Beard: All right. Did you or any of the group then go and smoke marijuana?

Mr. Hardy: Yes, we all did.

Mr. Beard: All right, where did you go?

Mr. Hardy: To the parking garage.

Mr. Beard: Did John have the marijuana in his car?

Mr. Hardy: Yes.

Mr. Beard: Did he offer it free?

Mr. Hardy: Yes, he did.

Mr. Beard: How much marijuana was consumed?

Mr. Hardy: One cigarette.

Mr. Beard: Where did you go after you finished?

Mr. Hardy: Back to the courthouse.

Mr. Beard: When is the third time that you can recall marijuana being offered?

Mr. Hardy: The next day. This was a frequent occasion.

Mr. Beard: All right. This was a frequent occasion? Okay, to avoid repeating this, Mr. Hardy, did John always keep the marijuana in his car?

Mr. Hardy: The first week he did, then he started taking it with him 'cause we didn't want to have to walk to the parking garage anymore.

Mr. Beard: So, Mr. Hardy had the marijuana with him in the courtroom?

Mr. Hardy: Right.

Mr. Beard: Where did the four of you go to smoke marijuana after that?

Mr. Hardy: Down past the Hyatt Regency.

Mr. Beard: Specifically, where?

Mr. Hardy: I don't know the road, it was past the hotel on the other side.

Mr. Beard: Was it a quiet place?

Mr. Hardy: Yeah, away from everybody.

Mr. Beard: Mr. Hardy, how often did this occur during the course of the trial, with regard to smoking marijuana?

Mr. Hardy: Just about every day except on maybe three or four occasions, five or six occasions, maybe, I would say when me and Craig didn't go with them.

Mr. Beard: All right, so, this began during the second week of trial, went through the entire trial, is that correct?

Mr. Hardy: Right.

Mr. Beard: With the exception of five or six occasions when you and Craig did not participate?

Mr. Hardy: Right, we were scared.

Mr. Beard: You were scared?

Mr. Hardy: Right.

Mr. Beard: Okay. Mr. Hardy, did there come a time during your association with the juror who we've identified as John, that you became aware that John was injesting cocaine during the noon hour?

Mr. Hardy: Yes.

Mr. Beard: Would you tell me about that please, sir?

Mr. Hardy: Well, he asked us did we want any toot.

Mr. Beard: Did you want any toot?

Mr. Hardy: Right. When we found that out we didn't have too much to do with him no more.

Mr. Beard: All right. Mr. Hardy, did you, at any time, see John injest cocaine?

Mr. Hardy: Yes, sir.

Mr. Beard: Would you explain that to me, when it occurred and where it occurred?

Mr. Hardy: At lunch, at the parking garage, in his car.

Mr. Beard: All right. Was there anyone present besides you and John?

Mr. Hardy: Yes. All three of the other, all four male jurors were there.

Mr. Beard: How much cocaine was injested by John?

Mr. Hardy: A pretty good bit, I would say. Of course I don't know too much about it.

Mr. Beard: Did John offer cocaine to any of the rest of you?

Mr. Hardy: Yeah, all of us.

Mr. Beard: Did anyone else participate?

Mr. Hardy: Yes, the guy from Bradenton that owned the carpet cleaning business.

Mr. Beard: Did John offer cocaine free of charge or was he selling it?

Mr. Hardy: Both.

Mr. Beard: Can you be more specific with me?

Mr. Hardy: Well, he offered it free of charge, he offered it to us free of charge on the occasions when we

were there, then he wanted to know did we want to buy any of it, plus he wanted to know did we want any marijuana too, and some did, was sold, I never seen it, but I heard him talk about it.

Mr. Beard: You heard who talking about it?

Mr. Hardy: John and the guy from the carpet cleaning store, he wanted to know if he wanted to buy a quarter pound.

Mr. Beard: To your knowledge . . .

Mr. Hardy: No, the guy asked him did he have, did he know where he could get a quarter of a pound.

Mr. Beard: Who is the guy?

Mr. Hardy: The guy from the carpet cleaning store in Bradenton, the carpet cleaning business.

Mr. Beard: All right. Do I understand you correctly that the juror from Bradenton, who owned the carpet cleaning business, inquired of John, also another juror, as to where he, meaning the carpet cleaner, could buy marijuana?

Mr. Hardy: Right.

Mr. Beard: And what did John tell him?

Mr. Hardy: He had it.

Mr. Beard: Did John tell the carpet cleaner that he would sell him marijuana?

Mr. Hardy: Yes, he did.

Mr. Beard: All right. How much did you observe the carpet cleaner injest, with regard to the cocaine?

Mr. Hardy: I would say a couple lines.

Mr. Beard: A couple of lines? What do you mean by a line, Mr. Hardy?

Mr. Hardy: Well, they would get a razor blade and chop it up and then make lines out of it.

Mr. Beard: Can you explain to me physically what we're talking about? When you say they, do you mean John and the carpet cleaner?

Mr. Hardy: John and the carpet cleaner.

Mr. Beard: Where was this done?

Mr. Hardy: In the parking garage.

Mr. Beard: Was it done in the car?

Mr. Hardy: Right.

Mr. Beard: What kind of a car does John drive?

Mr. Hardy: He drives a Gremlin.

Mr. Beard: What color is it?

Mr. Hardy: Brown.

Mr. Beard: Where did he keep the narcotics?

Mr. Hardy: In his glove compartment.

Mr. Beard: How were the narcotics packaged, and when we're talking about packaging, talk first about the marijuana, second about the cocaine. How was the marijuana packaged?

Mr. Hardy: It was in a, he kept it like, I would say a prescription bottle.

Mr. Beard: Was there a lot of marijuana?

Mr. Hardy: Just four or five things, maybe, he got four or five cigarettes out of it.

Mr. Beard: All right. With regard to the cocaine, how was that packaged?

Mr. Hardy: Well, he had it in a bag, you know, in a couple of thin, then later on he would bring a contraption that he had, I guess his wife called it, it had a bottle that you would screw onto the top of it and he would turn a handle on it down, and turn it upside down and that would fill up, would fill up, I don't know how to say it, it would fill up a compartment in it, then he would turn it up and then he would stick it up to his nose and suck on it or hit it, or whatever, up his nose.

Mr. Beard: Did you see John physically perform that function on any occasion?

Mr. Hardy: Yes, I did.

Mr. Beard: How many times?

Mr. Hardy: I'd say about five.

Mr. Beard: How many of those five times occurred during the Anthony Tanner trial?

Mr. Hardy: All of them. The only time I'm talking about is when it occurred on the Anthony Tanner trial at lunch time. It was done too, after the trial was over.

Mr. Beard: All right, for right now, let's stick specifically to the lunch hour. Did you ever become aware that the carpet cleaner from Bradenton was participating in the cocaine injestion as well?

Mr. Hardy: Yes.

Mr. Beard: How often did you see that carpet cleaner injest cocaine?

Mr. Hardy: Two or three times.

Mr. Beard: Where did the injestion take place?

Mr. Hardy: At the garage, parking garage.

Mr. Beard: All right, Mr. Hardy, explain to me if you would, what happened once John took the cocaine out of the glove compartment. Where did he put it and how did he cut it?

Mr. Hardy: He put it on a mirror and took a razor blade and chopped it up.

Mr. Beard: Where did he get the mirror?

Mr. Hardy: Out of his glove compartment.

Mr. Beard: Did he do it inside of the car or outside?

Mr. Hardy: Inside.

Mr. Beard: Did he divide the cocaine equally?

Mr. Hardy: No. He did more than what the guy from the carpet cleaning business did.

Mr. Beard: All right. Mr. Hardy, was there ever an occasion that the carpet cleaner from Bradenton and John, the young man on the jury, injested cocaine after the four of you had been consuming alcohol?

Mr. Hardy: Yes.

Mr. Beard: Was it frequent or infrequent?

Mr. Hardy: It was frequent, most of the time we went to lunch and ate and got us a beer and then we left to go to the parking garage.

Mr. Beard: All right. When you say ate and got us a beer, are you talking about one beer or pitchers of beer?

Mr. Hardy: Pitchers of beer.

Mr. Beard: So, after you consumed the pitchers of beer, John and, on occasion, the carpet cleaner member of the jury, injested cocaine, is that correct?

Mr. Hardy: That's right.

Mr. Beard: Were there occasions when all three things were done? Alcohol, marijuana, and cocaine?

Mr. Hardy: Yes, there was.

Mr. Beard: Mr. Hardy, were you able to discern a change of attitude, a change in physical alertness, or anything along those lines, with regard to John, the young man on the jury, after he drank and injested either marijuana or cocaine?

Mr. Hardy: Yeah, John just talked about how he was flying.

Mr. Beard: All right. What did he mean by that, in your opinion?

Mr. Hardy: Flying? I guess he was messed up.

Mr. Beard: Did John show any physical signs that were obvious to you?

Mr. Hardy: To me, yes, maybe not to a normal person.

Mr. Beard: What kind of signs?

Mr. Hardy: Well, he just, he'd stutter a little bit, you know, I know that they was falling asleep all the time during the trial.

Mr. Beard: When you say they, who are you talking about?

Mr. Hardy: Most, some of the jurors. Like John and the guy from the carpet cleaning store.

Mr. Beard: All right. Mr. Hardy, to your knowledge, did Craig ever take part in the cocaine injestion?

Mr. Hardy: No, he didn't.

Mr. Beard: Did you?

Mr. Hardy: No, I didn't. We didn't want to let them find out that, we didn't really, once we seen that, we didn't really want to get involved in that. Like I said, we were scared, we were scared that we was going to get in trouble and we really didn't want to have too much more to do with it after that. This went on about through the middle of the trial.

Mr. Beard: All right. Mr. Hardy, have you had any contact with any of the prosecutors since the verdict was rendered?

Mr. Hardy: Yes, I have.

Mr. Beard: Who initiated that contact?

Mr. Hardy: I, myself.

Mr. Beard: Who did you call?

Mr. Hardy: Mr. Runyon.

Mr. Beard: And what did you talk about?

Mr. Hardy: We talked about the alcohol consumption.

Mr. Beard: What did you tell Mr. Runyon?

Mr. Hardy: I told Mr. Runyon that we would just go out and get us a pitcher of beer and drink it, but as far as us being drunk, no we wasn't.

Mr. Beard: Did you tell Mr. Runyon about the marijuana?

Mr. Hardy: No, I didn't.

Mr. Beard: Did you tell Mr. Runyon about the cocaine?

Mr. Hardy: No, I didn't.

Mr. Beard: Mr. Hardy, you have expressed to me today this subject is not an easy one for you to discuss, is that correct?

Mr. Hardy: Right, I feel like I'm putting my family on the line.

Mr. Beard: Mr. Hardy, why are you talking to me and Mr. Taylor today?

Mr. Hardy: Because I felt like that the people on the jury didn't have no business being on the jury. I felt like that Mr. Tanner should have a better opportunity to get somebody that would review the facts right, that were able to review the facts.

Mr. Beard: Mr. Hardy, I want to make sure I understand you perfectly . . .

Mr. Beard: Mr. Hardy, we have switched to side 2 of this tape, and I asked you before we turned the tape over what motivated you to come forward? I want to make sure I understand you clearly. Are you telling me that your motivated by conscience?

Mr. Hardy: Right. I wanted to clear my conscience.

Mr. Beard: Is there anything else that motivated you, Mr. Hardy?

Mr. Hardy: No.

Mr. Beard: Has anybody offered you anything of value?

Mr. Hardy: No.

Mr. Beard: Has Mr. Tanner had any contact with you and encouraged you to come forward?

Mr. Hardy: No. The only time I ever seen Mr. Tanner was at the trial.

Mr. Beard: Has Mr. Best had any contact with you and encouraged you to come forward?

Mr. Hardy: No, he hasn't.

Mr. Beard: All right. When I say contact, I mean other than your most recent Saturday contact?

Mr. Hardy: Right.

Mr. Beard: Has Mr. Best offered you anything to come forward?

Mr. Hardy: No.

Mr. Beard: Have Mr. Taylor or I offered you anything of value to come forward?

Mr. Hardy: No.

Mr. Beard: Dan, a few minutes ago while we were talking, I asked you to restrict your comments to activities involving the jurors that took place during the noon hour, now I'd like to talk to you briefly about any activities that took place other than the noon hour. Were there occasions when you got together with other male or female jurors and participated in the use of marijuana or other drugs after the trial was completed for the day?

Mr. Hardy: Yes. I didn't, not, I never participated after, but it was done, I was there.

Mr. Beard: Tell me about those times.

Mr. Hardy: A couple times we went to the Sheraton, couple times we went to the Hyatt Regency and we just sit talk about the trial and you know, just like friends getting together.

Mr. Beard: All right. Mr. Hardy, when you say that you sat around and talked about the trial, do you recall the admonishment that Judge Crimsmon gave you and the other jurors during the trial, and when I say gave it to you, I mean gave it to you every time before you left the jury box at lunch and at the end of the day and specifically, with regard to not discussing the case even among yourselves?

Mr. Hardy: Yes, I do.

Mr. Beard: Did you have occasions to discuss that admonishment with other jurors?

Mr. Hardy: Yes, we did.

Mr. Beard: What was the attitude?

Mr. Hardy: They can't prove nothing.

Mr. Beard: Did members of the jury, in fact, discuss the evidence routinely?

Mr. Hardy: Yes, they did.

Mr. Beard: When I say routinely . . .

Mr. Hardy: That was mostly the topic of the conversation.

Mr. Beard: Did you talk about it on a daily basis?

Mr. Hardy: Yes, we did.

Mr. Beard: Were there times when the entire jury got together for lunch and the subject of the trial was discussed?

Mr. Hardy: Yeah, but not the entire jury, I mean not everybody, there was a few of the older women that went their own ways.

Mr. Beard: All right.

Mr. Hardy: A couple of them, they were straight down the line.

Mr. Beard: What do you mean by that, Mr. Hardy?

Mr. Hardy: Well, they were sticking to what we was supposed to be done.

Mr. Beard: All right. Mr. Hardy, during the course of the trial, did you become aware that the young blond juror by the name of John was using cocaine during the breaks in the trial?

Mr. Hardy: I felt like he was, I never seen him, but I knew he had that little contraption and he was going to the bathroom and come back down sniffing.

Mr. Beard: What do you mean come back out sniffing?

Mr. Hardy: Well, he'd sniffing, you know, you know, you know, like he got a cold, it would always seem like always had a cold.

Mr. Beard: All right. Mr. Hardy, during the course of the trial, did you learn that the young blond juror by the name of John had, in fact, sold a quarter of pound of marijuana to the juror who was a carpet cleaner from Bradenton?

Mr. Hardy: Yes, I did.

Mr. Beard: How did you learn about that?

Mr. Hardy: 'Cause he talked about it at lunch and he went to his, he was supposed to meet him in, at his house in St. Pete to pick it up.

Mr. Beard: Did you actually hear this conversation?

Mr. Hardy: Yes, I did.

Mr. Beard: Was there anyone else present?

Mr. Hardy: Yes, there was.

Mr. Beard: Who?

Mr. Hardy: Craig.

Mr. Beard: Did John provide the carpet cleaner from Bradenton with his home address?

Mr. Hardy: Yes, he did.

Mr. Beard: Did you see him do that?

Mr. Hardy: Yes, I did, telephone number too.

Mr. Beard: Was there discussion of price with regard to this quarter pound or marijuana?

Mr. Hardy: Yes, there was.

Mr. Beard: How much?

Mr. Hardy: Two hundred and fifty dollars.

Mr. Beard: Was there discussion of price with regard to cocaine at any time?

Mr. Hardy: Yes, there was.

Mr. Beard: Can you explain to me how that came about and what was discussed?

Mr. Hardy: He wanted to know if we wanted any cocaine, he said that he had an ounce of it and he would sell it to us for eighty dollars a gram.

Mr. Beard: Eighty dollars a gram?

Mr. Hardy: Right.

Mr. Beard: Who was offering the cocaine for sale?

Mr. Hardy: John.

Mr. Beard: When did these conversations take place?

Mr. Hardy: During the lunch hour and after the break of the day.

Mr. Beard: Mr. Hardy, to your knowledge, do any of the female jurors who were on the Tanner jury, have any knowledge concerning marijuana or cocaine?

Mr. Hardy: No.

Mr. Beard: Essentially, they know nothing about it as far as you know?

Mr. Hardy: Right.

Mr. Beard: All right. Mr. Hardy, during the course of the Tanner trial, and specifically during lunch, did the four male jurors have discussions about cocaine in general and the various methods that it could be used?

Mr. Hardy: Yes, we did.

Mr. Beard: Explain to me about that.

Mr. Hardy: John used to talk, he was trying to explain to the carpet cleaning guy how to freebase it.

Mr. Beard: What does freebasing mean?

Mr. Hardy: I don't know, just from what I got from them, from the conversations was that they smoked it. That you would smoke it, and cocaine is supposed to be cut and you have to cook it down, or whatever to do with it to be able to get the cut so you can get the pure cocaine out, that's what I got from the conversation.

Mr. Beard: Mr. Hardy, in your discussions or your dealings with John, the young juror, blond juror, did you ever observe any other method of injesting cocaine that John used?

Mr. Hardy: Yeah, he have like, of a sandwich bag that the corner was pulled off of it and it had a metal tie that would be wrapped around he would keep that and little straw and a razor blade inside of a Sucrets package.

Mr. Beard: All right, let me talk to you about that more specifically. Are we talking about a regular straw that he would put up to his nose?

Mr. Hardy: Right.

Mr. Beard: All right. Now, what were the other pieces of equipment?

Mr. Hardy: A razor blade.

Mr. Beard: A razor blade? Where was the razor kept?

Mr. Hardy: Inside the pack, inside the metal cases that you'd buy Sucrets, I remember that, it was that you would buy Sucrets throat lozenges with.

Mr. Beard: All right. So, it was a small flat case? What else was inside that Sucrets case?

Mr. Hardy: The cocaine too.

Mr. Beard: All right. What was the cocaine kept in?

Mr. Hardy: A sandwich baggie with the corner of the sandwich baggie.

Mr. Beard: Mr. Hardy, I have no further questions for you. Is there anything that you would like to add, other than what we've already discussed?

Mr. Hardy: I would come forward a long time ago, but I was scared because this is serious allegations being made and that I didn't want to get involved, I was scared of losing my job and putting my family on the line and so I just felt like that I should leave things alone and keep my mouth shut and go on about my life, go on with my life.

Mr. Beard: Mr. Hardy, we've identified one of the male jurors as a carpet cleaner from Brandenton. Do you recall anything about his name?

Hr. Hardy: Yes, I do.

Mr. Beard: What?

Mr. Hardy: His first name is Pat.

Mr. Beard: All right. Mr. Hardy, I've got one final question for you. During the period of time that you participated with the other male jurors in the consumption of beer and in the use of marijuana, do you feel that the combination of that usage affected your reasoning ability during the trial?

Mr. Hardy: Yes. That one day.

Mr. Beard: All right, when you say yes that one day, are you telling me there was only one day that you consumed both alcohol and marijuana?

Mr. Hardy: Marijuana, I consumed alcohol all the time.

Mr. Beard: All right. Was there only one day that you did both?

Mr. Hardy: Right. Yes, that was in the middle of the trial.

Mr. Beard: All right. Mr. Hardy, anything else you'd like to add?

Mr. Hardy: No.

Mr. Beard: All right, thank you, sir.

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

BEFORE ME, the undersigned authority, personally appeared DANIEL MARTIN HARDY, who, after being

duly sworn, deposes and says that he has read the above and foregoing statement consisiting of thirty (30) pages, tht he has personal knowledge of the facts and matters set forth therein, and that the statement is true and correct to the best of his knowledge.

/s/ DANIEL MARTIN HARDY

Sworn to and subscribed before me, this 17 day of October, A.D., 1984.

O. Douglas Beard
Notary Public, State of Florida at Large
NOTARY PUBLIC, State of Florida at Large

My Commission Expires July 13, 1985

Bonded by LAWYERS SURETY CORPORATION
My Commission Expires:
